Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

INTERNATIONAL TERMINAL CORPORATION,

Petitioner,

V.

M/T LOIRE AND LOIRE TRANSPORT, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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June 6, 1994

59pp

QUESTION PRESENTED

Whether under either admiralty law or federal law in general, a trial court's award of prejudgment interest at a rate that is noncompensatory by any relevant measure constitutes an abuse of discretion as a matter of law.

PARTIES TO THE PROCEEDING

The Petitioner appears through Ronald J. Sommers, Esq., Trustee of the Estate of International Terminal Corporation. In addition to the Petitioner, (i) National Union Fire Insurance Company, (ii) Commonwealth Insurance Company, (iii) California Union Insurance Company, and (iv) David Forrest, as Leader on behalf of the Underwriters and Companies subscribing to Policy No. XA8650457, were Appellees/ Cross-Appellants in the Court of Appeals, and plaintiffs in the District Court. The Respondents herein were the Appellants/ Cross-Appellees in the proceedings in the Court of Appeals, and the defendants in the District Court.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	7
I. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THE SEVENTH CIRCUIT AND IS INCONSISTENT WITH DECISIONS OF THIS COURT	7
II. THE LACK OF UNIFORM STANDARDS FOR AWARDS OF PREJUDGMENT INTEREST PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW	19
CONCLUSION	23
APPENDIX	A1 - D2

TABLE OF AUTHORITIES
CASES

Page

Borges v. Our Lady of the Sea Corp., 935 F.2d 436 (1st Cir. 1991) . 8, 9

Concise Oil & Gas Partnership v. Louisiana Intrastate Gas Corp., 986 F.2d 1463 (5th Cir. 1993), *reh'g denied*, 990 F.2d 1254 (5th Cir. 1993) . . 19

General Motors Corp. v. Devex Corp., 461 U.S. 648, 103 S.Ct. 2058, 76 L.Ed.2d 211 (1983) 7, 8, 21

Gorenstein Enters., Inc. v. Quality Care-USA, Inc., 874 F.2d 431 (7th Cir. 1989) . . 15

Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983) 22

Library of Congress v. Shaw, 478 U.S. 310, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986) 13

Loeffler v. Frank, 486 U.S. 549, 108 S.Ct. 1965, 100 L.Ed.2d 549 (1988) 7

Matter of Oil Spill By the Amoco Cadiz Off the Coast of France on March 16, 1978, 954 F.2d 1279 (7th Cir. 1992) . . . . . passim

Monessen S.W. Ry. Co. v. Morgan, 486 U.S. 330, 108 S.Ct. 1837, 100 L.Ed.2d 349 (1988) 15

Orduna S.A. v. Zen-Noh Grain Corp.,
913 F.2d 1149 (5th Cir. 1990) . . 9

Osterneck v. Ernst & Whinney,
489 U.S. 169, 109 S.Ct. 987,
103 L.Ed.2d 146 (1989) 7

Reeled Tubing, Inc. v. M/V CHAD G,
794 F.2d 1026 (5th Cir. 1986) . . 9

U.S. Fire Ins. Co. v. Allied Towing Corp.,
966 F.2d 820 (4th Cir. 1992) . . . 9

West Virginia v. United States,
479 U.S. 305, 107 S.Ct. 702,
93 L.Ed.2d 639 (1987) . . . passim

STATUTE

28 U.S.C. § 1254(1) 2

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

INTERNATIONAL TERMINAL CORPORATION,

Petitioner,

v.

M/T LOIRE AND LOIRE TRANSPORT, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner International Terminal Corporation (through Ronald J. Sommers, Trustee of the Estate of International Terminal Corporation) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The per curiam opinion of the Court of Appeals (App., infra, at p. A1-A2) is unreported. The District Court's findings

of fact and conclusions of law (App., infra, at p. C1-C21), and the judgment resulting therefrom (App., infra, at p. B1-B5), also are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 3, 1994. A petition for rehearing was denied on March 11, 1994. (App., infra, at p. D1-D2). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. This case involves an action in admiralty for damages arising out of an allision on the shipping waterways of Houston, Texas between the vessel M/T Loire and a dock and grain loading facility then owned by International Terminal Corporation ("ITC"). The accident occurred on July 30, 1987, and suit was filed that same date. The damage from the allision was so severe that it was impossible for ITC to load

grain ships from its elevator without extensive repairs to the facility. Thus, except for minor bagging operations, ITC was essentially unable to operate its business. At the same time, ITC did not have sufficient funds to repair the damaged facility.[1] Without the cash flow lost as a result of the allision, ITC could not meet its debt service, and the facility was eventually lost to foreclosure.

2. Prior to trial, liability for the allision was established by an agreement resulting in an Agreed Order. (App., infra, at p. C4). A bench trial on the issue of damages only was held on July 15-19, 1991. (App., infra, at p. C5). On June 22, 1992, judgment was entered in favor of the petitioners in the amount of

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[1] At the time of the allision, ITC was operating as a debtor-in-possession under Chapter 11 of the Bankruptcy Code. The district court's jurisdiction, however, was premised on 28 U.S.C. § 1333.

$8,969,147.44. (App., infra, at p. B1-B5). Included within the amount awarded was, inter alia, prejudgment interest as calculated to the date of the District Court's findings of fact and conclusions of law, i.e., August 28, 1991. (App., infra, at p. C17-C20). Also awarded was prejudgment interest from that date to the date of judgment, and post-judgment interest thereafter. (App., infra, at p. C20).

In both regards, the District Court awarded the federal post-judgment interest rate in effect at the time of post-trial submissions, which was over four years after the allision. (App., infra, at p. C19-C20). That rate was 6.26%, which the District Court adopted as the rate of interest over the entire prejudgment period. The uncontradicted record, however, demonstrated that this choice of a single rate in effect at a given point in time, as opposed to the rates in effect

over the course of the prejudgment period, denied ITC full (or even reasonable) compensation for the lost use of its funds. This was so because interest rates in general fell dramatically over the prejudgment period, such that each of the possible relevant alternative measures of prejudgment interest was substantially higher that the 6.26% rate chosen by the District Court.

For example, the evidence at trial established that ITC's average cost of borrowing over the prejudgment period was 11.44%. The evidence further established that the average prime rate over that period was 9.2523%, while 10% was the applicable statutory measure of prejudgment interest under Texas law. Even the average federal post-judgment interest rate over the period in question was 7.69%. Nevertheless, the District Court without explanation disregarded the uncontradicted

evidence in this regard, and awarded prejudgment interest over the entire prejudgment period at the rate of 6.26%. In other words, the court uniformly applied an interest rate that bore no relation to the prejudgment period and substantially under-compensated ITC under any measure of record. ITC's subsequent requests for reconsideration of, or a new trial on, this issue (among others) were denied by the District Court.

3. On cross-appeals, the Court of Appeals affirmed in all respects in a two-sentence per curiam opinion.[2/] In so doing, the court left intact the noncompensatory award of prejudgment interest included in the District Court's judgment. Thus, the Court of Appeals necessarily rejected the

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[2/] In its entirety, the opinion below states as follows: "No finding of fact has been shown to be clearly erroneous. Essentially for the reasons stated by the district court, the judgment is AFFIRMED."

petitioner's contention that the award of prejudgment interest at a rate that was not fully compensatory constituted an abuse of the District Court's discretion as a matter of law. ITC's petition for panel rehearing (which addressed an issue other than the prejudgment interest issue) was denied without comment. (App., infra, at p. D1-D2).

REASONS FOR GRANTING THE WRIT

I.

THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THE SEVENTH CIRCUIT AND IS INCONSISTENT WITH DECISIONS OF THIS COURT.

As this Court has repeatedly observed, "[p]rejudgment interest is an element of complete compensation." West Virginia v. United States, 479 U.S. 305, 310, 107 S.Ct. 702, 706, 93 L.Ed.2d 639, 646 (1987). See, e.g., Osterneck v. Ernst & Whinney, 489 U.S. 169, 175, 109 S.Ct. 987, 991, 103 L.Ed.2d 146, 154 (1989); Loeffler v. Frank, 486 U.S. 549, 558, 108 S.Ct. 1965, 1971, 100 L.Ed.2d 549, 559 (1988); General Motors

Corp. v. Devex Corp., 461 U.S. 648, 655-56, 103 S.Ct. 2058, 2062-63, 76 L.Ed.2d 211, 217-18 (1983). More precisely, prejudgment interest "serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress." West Virginia v. United States, supra, at 310 n.2. At the same time, an award of prejudgment interest serves to prevent a windfall to the defendant, who has had the use of the money at issue from the date the plaintiff's claim accrued until the date of judgment. See, e.g., General Motors Corp. v. Devex Corp., supra, at 655-56 n.10; Borges v. Our Lady of the Sea Corp., 935 F.2d 436, 444 (1st Cir. 1991).

"Under maritime law, the awarding of prejudgment interest is the rule rather than the exception, and, in practice, is

well-nigh automatic." Reeled Tubing, Inc. v. M/V CHAD G, 794 F.2d 1026, 1028 (5th Cir. 1986). Accord, U.S. Fire Ins. Co. v. Allied Towing Corp., 966 F.2d 820, 828 (4th Cir. 1992). See also Borges v. Our Lady of the Sea Corp., supra, at 443-44 and n.1. Unless a case involves "peculiar circumstances" that would make an award of prejudgment interest inequitable, a decision not to award prejudgment interest in an admiralty case is an abuse of discretion. See, e.g., Orduna S.A. v. Zen-Noh Grain Corp., 913 F.2d 1149, 1157 (5th Cir. 1990).

There were, of course, no findings of "peculiar circumstances" in this case, as the District Court awarded ITC prejudgment interest. It is, therefore, the amount of prejudgment interest awarded, and not the award of prejudgment issue vel non, that is at issue in this matter.

In this regard, the decision of the Court of Appeals is fundamentally at odds

with this Court's teachings on prejudgment interest. As noted at pp. 4-6, supra, the rate--and therefore the dollar amount--of prejudgment interest awarded to ITC was substantially less than any rate or amount that can be defended under any relevant measure, and necessarily resulted in substantial under-compensation.

Even accepting the proposition that the district courts have discretion in this arena, the limitless choice permitted by the Fifth Circuit in this case, with no discernible governing standard at work, is unacceptable. Although discretion exists, it must be exercised in accordance with the compensatory goal of prejudgment interest. As the Seventh Circuit has noted:

> Many cases say that district courts have discretion to adjust the rate of interest or deny interest altogether. . . . Discretion [however] is not unbridled; it is exercised under law. "[D]iscretionary choices are not left to a court's 'inclination, but to its

> judgment; and its judgment is to be guided by sound legal principles.'" Albemarle Paper Co. v. Moody, 422 U.S. 405, 416, 95 S.Ct. 2362, 2371, 45 L.Ed.2d 280 (1975), quoting from United States v. Burr, 25 F. Cas. 30, 35 (No. 14,692d) (CC Va. 1807) (Marshall, C.J.).
>
> * * *
>
> Limits [to "acceptable discretion"] there must be--for what is the point of computing the principal amount of damages in intricate detail if the judge may turn around and increase (or reduce) the value of that award by a factor of three on the basis of vague equitable concerns? "We must not invite the exercise of judicial impressionism. Discretion there may be, but 'methodized by analogy, disciplined by system.' Cardozo, The Nature of the Judicial Process, 139, 141 (1921). Discretion without a criterion for its exercise is authorization of arbitrariness." Brown v. Allen, 344 U.S. 443, 496, 73 S.Ct. 397, 441, 97 L.Ed. 469 (1953) (Frankfurter, J.).

Matter of Oil Spill By the Amoco Cadiz Off the Coast of France on March 16, 1978, 954 F.2d 1279, 1335 (7th Cir. 1992) ("Amoco Cadiz"). Accordingly, when, as here, the

record demonstrates that the prejudgment interest awarded is plainly not consistent with the goal of complete compensation, the trial court has abused its discretion.

More specifically, the choice of a 6.26% rate--being the post-judgment statutory rate in effect at the end of a three year period of declining interest rates--was an abuse of discretion when considered in the light of the undisputed record. The District Court not only took the lowest conceivable measure for prejudgment interest, but also took that rate at a point in time that bore no relation to the real-world prejudgment period. This treatment is wholly inconsistent with this Court's admonitions that awards of prejudgment interest are intended to be fully compensatory.

The choice of the post-judgment interest rate at the time of post-trial submissions was also inconsistent with this

Court's precedents because that choice is definitionally not compensatory. The choice of a single rate, selected only at the end of a lengthy period of largely declining interest rates, fails to reflect real world changes in interest rates regardless of the measure chosen. See Amoco Cadiz, supra, at 1334. Thus, under whatever measure of interest is chosen, the trial courts should look retrospectively to the actual interest rates in effect over the course of the prejudgment period.

In sum, to achieve its conceptual objective, an award of compensatory prejudgment interest in a tort action should be at an interest rate corresponding to the victim's "opportunity cost" over the prejudgment period. Library of Congress v. Shaw, 478 U.S. 310, 322, n. 7, 106 S.Ct. 2957, 2965, n.7, 92 L.Ed.2d 250, 262, n.7 (1986) ("When interest is awarded . . . it is computed by multiplying a particular

rate of interest by the amount of the award [and the] interest rate reflects not only the real opportunity costs of capital but also the inflation rate.") (citation omitted). Thus, the method chosen by the District Court in this case is conceptually indefensible. By definition, a "post" judgment rate is one that applies prospectively, and not retrospectively. Accordingly, even accepting that it is a permissible exercise of discretion to use the post-judgment rate as a "prejudgment" rate, that very choice nevertheless commands that the rate not be the one in effect at the time of trial but, instead, the rate(s) in effect between the date of injury and the time of trial. Amoco Cadiz, supra, at 1332. Because the methodology utilized by the District Court necessarily resulted in substantial under-compensation to ITC, the decision below is inconsistent with this Court's precedents on prejudgment interest.

See, e.g., Monessen S.W. Ry. Co. v. Morgan, 486 U.S. 330, 335, 108 S.Ct. 1837, 1842, 100 L.Ed.2d 349, 358 (1988) ("Prejudgment interest is normally designed to make the plaintiff whole and is part of the actual damages sought to be recovered."); West Virginia v. United States, supra.

In addition, the decision below directly conflicts with the Seventh Circuit's decisions in Amoco Cadiz and Gorenstein Enters., Inc. v. Quality Care-USA, Inc., 874 F.2d 431 (7th Cir. 1989). In Amoco Cadiz, as in this case, the district court awarded prejudgment interest, but did so at a single rate over a very long prejudgment period. And again as in this case, the trial court selected as the rate of prejudgment interest to be awarded the federal post-judgment interest rate in effect at the end of the case. Amoco Cadiz, supra, at 1330-31. Given the nature of the case and the length of the

prejudgment period, the economic impact of that choice was staggering.

The Seventh Circuit upheld the trial court's award of prejudgment interest, but expressly rejected the methodology that had been employed to calculate the amount of interest awarded. First, the trial court's reliance on the federal post-judgment interest rate was eschewed in favor of interest at the "market rate." Id., at 1331-32. At a minimum, in the absence of more "refined rate-setting, a court should use [as the market rate for purposes of determining the prejudgment interest rate] the 'prime rate'-that is, the rate banks charge for short-term unsecured loans to creditworthy customers." Id., at 1332. Thus, reiterating its prior holding in Gorenstein, supra, the Court of Appeals expressly disapproved use of the post-judgment rate for prejudgment interest.

Second, the Court rejected the use of a single interest rate in effect at a given point in time. "[I]t should be plain that the market rate in question is the one during the litigation - when the defendant had the use of the money that the court has decided belongs to the plaintiff - not the going rate at the end of the case." Id., at 1332 (emphasis in original). As an illustration of why this is so, the Court of appeals observed that

> "[a]s it would be inappropriate to award prejudgment interest at a 20% rate if that happened to prevail in the last week of a case (and the rate had been 5% for the preceding decade), so it is inappropriate to use a low rate such at 7% for which money may be rented at the conclusion, when higher rates persisted throughout the bulk of the case."

Id., at 1332. Thus, the appropriate measure of prejudgment interest was held to be the average prime rate over the course of the prejudgment period. Id., at 1335.

The decisions below are in direct conflict with the Seventh Circuit's decisions in Amoco Cadiz and Gorenstein. The Seventh Circuit requires that discretionary awards of prejudgment interest be based, at a minimum, on the "market rate" of interest in effect over the course of the prejudgment period. The Fifth Circuit, on the other hand, permits awards of prejudgment interest to be based on a single rate in effect at the end of the proceeding, without regard to whether or not the resulting award achieves the goal of full compensation for the injured party. The conflict between the Courts of Appeals on this subject could not be more complete. The matter deserves this Court's consideration so that the conflict may be eliminated and the lower courts may be properly guided in this important area of admiralty and federal law.

II.

THE LACK OF UNIFORM STANDARDS FOR AWARDS OF PREJUDGMENT INTEREST PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW.

Questions concerning awards of prejudgment interest can be a significant part of modern-day litigation. In Amoco Cadiz, for example, "[b]ecause the accident occurred so long ago, the largest issue in the case is prejudgment interest." Amoco Cadiz, supra, at 1330. Given that it is (or can be) an important part of federal litigation, reasonably specific if not uniform standards should be developed for awards of prejudgment interest.[3/] The Seventh Circuit's approach to this issue

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[3/] In diversity actions, awards of prejudgment interest are governed by state law. See, e.g., Concise Oil & Gas Partnership v. Louisiana Intrastate Gas Corp., 986 F.2d 1463 (5th Cir. 1993), reh'g denied, 990 F.2d 1254 (5th Cir. 1993). The matters at issue in this case involve only awards of prejudgment interest under admiralty and general federal law. Thus, no questions involving awards of prejudgment interest under state law are at issue.

reflects just that, i.e., a set of standards that closely governs awards of prejudgment interest. Specifically, the Seventh Circuit requires (i) that a "market rate" of interest be awarded, and (ii) that the "market rate" be the actual rate(s) in effect during the prejudgment period.

The Fifth Circuit, on the other hand, permits the trial courts virtually unlimited discretion, without reference to any guiding standards, in dealing with awards of prejudgment interest. As this case illustrates, even with no finding of inequity of any sort by the trial court, the Court of Appeals upheld an award of prejudgment interest measured by a federal post-judgment rate which the undisputed record shows bore no relation to compensation. This approach is not compatible with that of the Seventh Circuit, results in under-compensation for the victim, and reflects a degree of

discretion in the trial courts that is simply too great. The chasm between these two approaches should be addressed by this Court, and narrowed, if not closed, in favor of the Seventh Circuit's approach.

The decision in Amoco Cadiz (and the Seventh Circuit's approach in general) is supported by this Court's decisions in West Virginia v. United States, supra, and General Motors v. Devex Corp., supra. Again, awards of prejudgment interest are an element of complete compensation, and are intended to ensure that the injured party is fully compensated. Conceptually, the Seventh Circuit's approach most nearly achieves the intended goal of full compensation, because it looks to the actual market rates in effect over the course of the prejudgment period to determine the rate of prejudgment interest to be awarded.

The point is that, in the absence of uniform standards governing awards of

prejudgment interest under federal law, similarly situated litigants can and do experience wide disparities in the interest rates awarded. Such disparities are not consonant with this Court's views on the nature and purpose of prejudgment interest under federal law. As in Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983), the inconsistent standards employed by the Courts of Appeals should be brought into at least rough harmony.[4] A uniform standard should be established for awards of prejudgment interest under both admiralty and general federal law, and the Seventh Circuit's approach to awards of prejudgment interest should be adopted as the model in

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[4] In Jones & Laughlin Steel Corp. v. Pfeifer, supra, the Court provided guidance to the lower courts as to appropriate ways of calculating damages under § 4 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 904.

this regard. Only this Court can address this important matter on a national scale. Thus, this case raises important questions of federal law that are fully deserving of the Court's attention.

CONCLUSION

For the reasons set forth above, the Petitioner respectfully submits that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 6, 1994

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2765

INTERNATIONAL TERMINALS CORP., ETC., ET AL.,

Plaintiffs-Appellees,
Cross-Appellants,

VERSUS

M/T LOIRE, ETC., ET AL.,

Defendants-Appellants,
Cross-Appellees.

****

IN THE MATTER OF THE COMPLAINT OF LOIRE TRANSPORT, INC., ETC., ET AL.,

Plaintiffs,

VERSUS

INTERNATIONAL TERMINALS CORP., ETC., ET AL.,

Defendants.

Appeals from the United States District Court for the Southern District of Texas
(CA.H.87-2429 c/w H-87-4096)

[ENTERED FEBRUARY 3, 1994]

Before WISDOM, BARKSDALE, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

No finding of fact has been shown to be clearly erroneous. Essentially for the reasons stated by the district court, the judgment is

AFFIRMED.

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* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

INTERNATIONAL TERMINAL CORPORATION, by and through RONALD J. SOMMERS, TRUSTEE, NATIONAL UNION FIRE INSURANCE COMPANY, COMMONWEALTH INSURANCE COMPANY, CALIFORNIA UNION INSURANCE COMPANY, and DAVID FORREST, as Leader on behalf of the Underwriters and Companies Subscribing to Policy No. XA8650457,	§	C.A. NO. H-87-2429 (Admiralty)
Plaintiffs,	§	
VS.	§	
M/T LOIRE and LOIRE TRANSPORT, INC.,	§	
Defendants.	§	

[ENTERED JUNE 22, 1992]

FINAL JUDGMENT

The Court enters this Final Judgment in accordance with FED. R. CIV. P. 54(a). International Terminal Corporation, by and through Ronald J. Sommers, Trustee,

National Union Fire Insurance Company, Commonwealth Insurance Company, California Union Insurance Company, and David Forrest, as Leader on behalf of the Underwriters and Companies subscribing to Policy No. XA8650457, are awarded judgment against the M/T Loire and The Standard Steamship Owner's Protection and Indemnity Association (Bermuda) Limited, the M/T Loire's surety, jointly and severally for the following relief:

1. $8,969,147.44 ("Amount No. 1");

2. prejudgment interest on Amount No. 1 from August 28, 1991, through date of judgment calculated at $1,530.92 per day ("Amount No. 2");

3. costs of suit ("Amount No. 3"); and

4. post-judgment interest on the combined sum of Amount Nos. 1, 2, and 3 calculated at the rate of __ percent per annum, compounded annually from date of judgment until date paid.

The Court further orders that the Clerk of the Court immediately disburse the principal sum of $2,377,860.81, together with any and all interest accrued thereon, hereto [sic] deposited into the registry of the Court in connection with this case, as follows:

1. one check shall be payable to Ronald J. Sommers, Trustee for International Terminal Corporation, in the amount of $1,855,000.00 ("Check No. 1"); and

2. one check shall be payable jointly to Ronald J. Sommers, Trustee for International Terminal Corporation, and R. M. Sharpe, Jr., Trustee for ITC's Insurance Underwriters, in the amount of $313,047.75 ("Check No. 2"); and

3. one check shall be payable to R.M. Sharpe, Jr., Trustee for ITC's Insurance Underwriters, for the remainder of the monies on deposit in connection with this case, including principal in the amount of $209,813.06 and any interest accrued on the $2,377,860.81 from date of deposit until date paid ("Check No. 3").

The combined sum of Check Nos. 1, 2, and 3 shall be credited against the amount owing on this Final Judgment as of the date Check Nos. 1, 2, and 3 are issued.

Any relief not expressly granted herein is denied.

SIGNED this 19 day of June, 1992.

/s/ David Hittner
DAVID HITTNER
UNITED STATES DISTRICT JUDGE

Approved as to Form Only
and Entry Requested:

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

INTERNATIONAL TERMINAL CORPORATION, by and through RONALD J. SOMMERS, Trustee, NATIONAL UNION FIRE INSURANCE COMPANY, COMMONWEALTH INSURANCE COMPANY, CALIFORNIA UNION INSURANCE COMPANY, and DAVID FORREST, as Leader on behalf of the Underwriters and Companies Subscribing to Policy No. XA8650457,	§	
Plaintiff[sic],	§	
V.	§	CIVIL ACTION NO. H-87-2429 (ADMIRALTY)
M/T LOIRE and LOIRE TRANSPORT, INC.,	§	
Defendants.	§	

[ENTERED AUGUST 28, 1991]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case was tried to the Court from July 15 through July 19, 1991. The Court has reviewed the evidence, the post-trial submissions of the parties, and the

applicable law. The Court now enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

A. JURISDICTION AND VENUE

1. This is an admiralty or maritime case within the meaning of Fed. R. Civ. P. 9(h).

2. This case concerns an allision that occurred at a dock and grain elevator which is located in the Port of Houston.

B. PARTIES

3. International Terminal Corporation ("ITC"), by and through Ronald J. Sommers, trustee, is a plaintiff. ITC is a Texas corporation with its principal place of business in Houston, Texas.

4. Ronald J. Sommers is the duly appointed trustee for a creditors' trust consisting of ITC's assets. This trust was formed pursuant to ITC's confirmed chapter 11 plan of reorganization.

5. National Union Fire Insurance Company, Commonwealth Insurance Company, California Union Insurance Company, and David Forrest as Leader on behalf of the Underwriters and Companies Subscribing to Policy No. XA8650457 (collectively "the Insurance Companies") are also plaintiffs. The Insurance Companies are subrogated underwriters of ITC and acquired their interests in this case by and through ITC. The parties have stipulated that ownership of ITC's claims, as between ITC and the Insurance Companies, is correctly set forth in Plaintiffs' Exhibit No. 52.

6. The M/T Loire is a merchant vessel of Liberian registry.

7. Loire Transport, Inc. ("Loire Transport") is also a defendant. Loire Transport owned 100 percent of the M/T Loire at the time of the allision. Loire Transport is a Liberian corporation.

C. LIABILITY

8. On July 30, 1987, the M/T Loire allided with a dock and grain elevator facility owned by ITC.

9. ITC filed this case on July 30, 1987 to recover its damages caused by the allision.

10. ITC filed a motion for summary judgment on the issue of liability on November 7, 1990. The Court entered an agreed order on January 30, 1991 that resolved the motion. The Court's order provides in pertinent part:

> M/T Loire, in rem, is liable to Plaintiffs for any recoverable damages sustained by International Terminal Corporation ("ITC") as a result of the M/T Loire's allision with ITC's facility on July 30, 1987, to the extent of one hundred percent (100%) of the "value" of the M/T Loire after the allision and pending "freight" within the meaning of 46 U.S.C. § 185. . . .

11. The parties filed an agreed motion on February 19, 1991 that resulted

in the Court's order entered March 1, 1991. The March 1, 1991 order provides in pertinent part:

> [T]he trial presently set forth in the Court's scheduling order shall be limited to a determination of the amount of International Terminal Corporation's ("ITC") compensatory damages, if any, arising out of the M/T Loire's allision with ITC's docket and grain elevator facility on July 30, 1987. . . .

12. Therefore, the Court called this case to trial on July 15, 1991 solely to determine the amount of ITC's compensatory damages proximately caused by the allision.

13. The Court has previously bifurcated, and thus left for later resolution, the apportionment of liability for damages among the defendants.

D. PROPERTY DAMAGES

14. The reasonable and necessary cost of repairing the property damage done to the ITC facility by the allision, making an appropriate deduction for any value added

to the facility through its repair, is $3,058,736.75. This net reasonable and necessary cost of repair is the product of the following equation:

	Total Reasonable and Necessary Cost of Repair	$3,466,520.11
-	Value Added by the Repair	407,783.36
=	Net Reasonable and Necessary Cost of Repair	$3,058,736.75

15. The Court bases its calculation as to the $3,466,520.11 figure on testimony and exhibits concerning the reasonable repair costs incurred by Woodhouse Corporation ("Woodhouse"), as ITC's successor, and on a stipulation by the parties.

16. Woodhouse obtained ownership of the dock and grain elevator facility after ITC lost the facility's ownership through foreclosure proceedings in June 1988.

17. The $3,466,520.11 total cost of repair comprises the following figures:

$3,296,344.19 in actual repair costs and $170,175.92 in debris clearance costs.

18. The parties stipulated prior to trial that the reasonable cost of debris clearance was $170,175.92.

19. The Court finds that the $3,296,344.19 amount represents a reasonable repair cost.

20. The Court specifically finds, based on the evidence regarding Woodhouse's experience in repairing the facility, that the Texas Air Control Board ("TACB") would have required ITC to install a dust control system if ITC had sought to repair the grain facility's central tower. The provision of such a dust control system was a reasonable and necessary cost of Woodhouse's repair, and thus serves as part of a reasonable calculation of damages incurred by ITC.

21. In effecting repairs, Woodhouse sought primarily to reconstruct the

facility, rather than to build a redesigned facility.

22. Woodhouse reasonably relied on TACB's representations that a construction permit, and thus a dust control system, would be required in effecting the reconstruction of the facility's central tower.

23. The Court finds that ITC failed to present adequate proof to justify its claims for sales taxes and bid and survey expenses, in addition to the costs represented in the $3,296,344.19 figure.

24. The Court finds that the sum of $407,783.36 is a reasonable calculation of the value added to the ITC facility by the repairs as effected by Woodhouse.

E. LOST NET REVENUES

25. The Court finds that ITC is entitled to recover net revenues for its lost grain throughput operations for a period of 14 months from the time of the allision.

26. The Court bases its finding of 14 months as the relevant loss period in part on the testimony of Mr. Giddings Emery that under Woodhouse's direction, the reconstruction process took 14 months.

27. ITC obtained ownership of the facility approximately 17 months prior to the allision.

28. The Court finds that the most probable projection of the throughput business ITC would have done but for the casualty requires an application of ITC's historical market share during its 17 months of existence to the total grain exports along the North Texas coast of the Gulf of Mexico during the relevant loss period.

29. The Court bases its finding that ITC would not have increased its market share after the casualty in part on indications in the evidence that ITC was not engaging in efforts to increase its

market share, was in bankruptcy, and had a limited number of customers.

30. The Court finds further that overall grain business among Texas put-through and company-owned elevators increased during the relevant loss period, in large part because of increased purchases of grain by the Soviet Union. However, the market share for Texas put-through elevators remained steady throughout the relevant loss period.

31. By basing the loss of use analysis on ITC's historical market share, applied to post-casualty exports, the Court is allowing ITC to benefit from increased exports during the relevant loss period to a supportable extent.

32. The Court finds that ITC's net throughput revenue during the relevant loss period would have been .0585 cents per bushel.

33. The Court finds that but for the allision, ITC would have put through the volumes of grain as indicated in Defendant's Exhibit No. 1, Tab 6, pages 3-4.

34. Based upon a reasonable repair period of 14 months, ITC lost $3,399,936.00 in net throughput revenue.

35. The Court specifically finds that the calculations of Mr. Dennis Arnie, as incorporated into these findings, represent a reliable projection of ITC's lost net throughput revenues during the relevant loss period. The Court finds further that Mr. Arnie's calculations are based on reliable, objective data.

36. The Court specifically finds that the calculation of lost net throughput revenues as set out above is reasonably certain.

37. Even though ITC historically had never earned a profit on its overall operations, the evidence established that

during the relevant loss period, ITC would have earned net revenue on its put-through operations.

38. The Court finds that ITC is not entitled to recover any additional net lost revenue related to its bagging or storage operations.

F. ADDITIONAL BUSINESS EXPENSES

39. ITC has previously settled a post-allision claim levied against it by one of its customers, Cargill.

40. The parties have stipulated that ITC shall recover 82.875 percent of the Cargill settlement amount for which ITC seeks reimbursement in the Joint Pretrial Order. This percentage results in an additional recovery of $542,831.25.

G. ADOPTION OF CONCLUSIONS OF LAW

41. Any conclusion of law hereafter recited that should be deemed a finding of fact is found to be true in all respects and is hereby adopted as such.

CONCLUSIONS OF LAW

A. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of the present action, as this matter arises under this Court's admiralty and maritime jurisdiction, pursuant to 28 U.S.C. § 1333 (1988) and the Admiralty Extension Act, 46 U.S.C. app. § 740 (1988).

2. Venue is proper in the Southern District of Texas, as the events that gave rise to this claim occurred within this district. 28 U.S.C. § 1391(b) (1988).

B. APPLICABLE LAW

3. This matter is governed by general maritime law. See, e.g., Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1031-32 (5th Cir. 1985), cert. denied, 477 U.S. 903 (1986); Freeport Sulphur Co. v. S/S Hermosa, 526 F.2d 300, 302 n.2 (5th Cir. 1976); Crispin Co. v. M/V Korea, 251 F.Supp. 878, 879 (S.D. Tex. 1965).

C. DAMAGES RECOVERY IN GENERAL

4. The purpose of compensatory damages in admiralty tort cases "is to place the injured person as nearly as possible in the condition he would have occupied if the wrong had not occurred." Freeport Sulphur Co., 526 F.2d at 304. In re M/V Elaine Jones, 480 F.2d 11, 27 (5th Cir. 19[illegible]). This principle has been stated in admiralty as restitutio in integrum. See, e.g., The Baltimore, 75 U.S. (8 Wall.) 377, 385-386 (1869); Bouchard Transportation Co. v. Tug "Ocean Prince", 691 F.2d 609, 611-12 (2d Cir. 1982).

5. The doctrine of restitutio in integrum does not allow a plaintiff "[t]o profit by one's loss." Skou v. United States, 478 F.2d 343, 346 (5th Cir. 1970).

D. PROPERTY DAMAGES

6. ITC is entitled to recover the reasonable and necessary cost of repairing the damage caused by the allision.

Freeport Sulphur Co., 526 F.2d at 304; In re M/V Elaine Jones, 480 F.2d at 27.

7. When the repairs that are necessary to correct damage caused by negligence enhance the pretort value of the plaintiff's property, the increase in value is deducted from the plaintiff's recovery for the cost of repair. Freeport Sulphur Co., 526 F.2d at 304; In re M/V Elaine Jones, 480 F.2d at 27.

8. Accordingly, the Court concludes that the following formula properly determines the net reasonable and necessary cost of repair in this case:

Total Reasonable and Necessary Cost of Repair

\- Value Added by the Repair

= Net Reasonable and Necessary Cost of Repair

E. LOST NET REVENUES

9. An injured party to an admiralty case can recover lost profits as long as it proves those damages with reasonable

certainty. See, e.g., Delta Steamship Lines v. Avondale Shipyards, 747 F.2d 995, 1000-01 (5th Cir. 1984); Rogers Terminal & Shipping Corp. v. International Grain Transfer, Inc., 672 F.2d 464, 466 (5th Cir. 1982); Delta Marine Drilling Co. v. M/V Baroid Ranger, 454 F.2d 128, 130 (5th Cir. 1972). That such damages "may not be susceptible of exact measurement does not make them any less recoverable." Rogers Terminal, 672 F.2d 466.

10. The proper legal formula for determining the amount of ITC's net revenue loss in its put-through operations is:

Gross Revenues Lost

\- Expenses Saved

= Net Revenues Lost

See, e.g., In re M/V Vulcan, 553 F.2d 489, 490 (5th Cir.), cert. denied, 434 U.S. 855 (1977); Skou, 478 F.2d at 347.

11. "Fixed costs" are not considered in calculated [sic] lost net revenues. Cf.

Adams v. Lindblad Travel, Inc., 730 F.2d 89, 92-93 (2d Cir. 1984).

F. PREJUDGMENT INTEREST

12. "[T]he general rule in admiralty is to award interest from the date of the collision except where peculiar circumstances warrant awards only from the date of judgment." Mobil Oil Corp. v. Tug Pensacola, 472 F.2d 1175, 1176 (5th Cir. 1973); see Bunge Corp. v. American Commercial Barge Line Co., 630 F.2d 1236, 1242 (7th Cir. 1980); American Zinc Co. v. Foster, 441 F.2d 1100, 1101 (5th Cir.), cert. denied, 404 U.S. 855 (1971).

13. The Fifth Circuit has recognized that "[u]nder maritime law, the awarding of prejudgment interest is the rule rather than the exception, and, in practice, is well-nigh automatic." Reeled Tubing, Inc. v. M/V Chad G, 794 F.2d 1026, 1028 (5th Cir. 1986); see Orduna S.A. v. Zen-Noh Grain Corp., 913 F.2d 1149, 1157 (5th Cir.

1990); In re P&E Boat Rentals, Inc., 872 F.2d 642, 654 (5th Cir. 1989); Albany Insurance Co. v. Bengal Marine, Inc., 857 F.2d 250, 253-54 (5th Cir. 1988); Inland Oil and Transport Co. v. Ark-White Towing, Co., 696 F.2d 321, 327 (5th Cir. 1983); Masters v. Transworld Drilling Co., 688 F.2d 1013, 1014 (5th Cir. 1982); Mecom v. Levingston Shipbuilding Co., 622 F.2d 1209, 1217 (5th Cir. 1980).

14. A trial court should deny prejudgment interest only when "peculiar circumstances" would make such an award inequitable. Reeled Tubing, Inc., 794 F.2d at 1028. The Court has found no "peculiar circumstances" in this case that would make an award of prejudgment interest inequitable.

15. The Court specifically declines to find that ITC obtained an abatement of this suit against the wishes of the defendants. The record demonstrates that

ITC and the defendants agreed to abate this case while ITC pursued claims against its insurers for property damage and business interruption.

16. Furthermore, an award of prejudgment interest in this case serves not as a penalty against the defendants but as compensation to ITC for the use of funds wrongly withheld. See, e.g., Graham v. Milky Way Barge, Inc., 824 F.2d 376, 390 (5th Cir. 1987); Noritake v. M/V Hellenic Champion, 627 F.2d 724, 728 (5th Cir. Unit A 1980).

17. The Court finds that a reasonable prejudgment interest rate is that set out in 28 U.S.C. § 1961 (1988) for postjudgment interest on federal judgments. See Reeled Tubing, 794 F.2d at 1029. The Court will calculate prejudgment interest from July 30, 1987.

18. The prevailing federal postjudgment interest rate at the time that

the parties' post-trial submissions were due, and thus at the time when the case was ripe for decision by the Court, was 6.26 percent per annum.

19. The corresponding rate of prejudgment interest from August 28, 1991 forward is $1,530.92 per day.

G. POSTJUDGMENT INTEREST

20. The Court will award postjudgment interest at the rate provided by 28 U.S.C. § 1961.

H. TOTAL RECOVERY

21. Based on the above findings of fact and conclusions of law, the Court will award ITC the following as damages:

Property Damage	$3,058,736.75
Lost Net Revenue	3,399,936.00
Additional Business Expenses	542,831.25
Prejudgment Interest (as calculated to 8/27/91)	1,967,643.44
Total Recovery	$8,969,147.44

H. ADOPTION OF FINDINGS OF FACT

22. Any finding of fact that should be deemed a conclusion of law is hereby adopted as such.

SIGNED at Houston, Texas, on this the 28 day of August, 1991.

/s/ David Hittner
DAVID HITTNER
United States District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2765

INTERNATIONAL TERMINALS CORP., ETC., ET AL.,

Plaintiffs-Appellees,
Cross Appellants,

versus

M/T LOIRE, ETC., ET AL.,

Defendants-Appellants,
Cross Appellees.

****

IN THE MATTER OF THE COMPLAINT OF LOIRE TRANSPORT, INC., ETC., ET AL.,

Plaintiffs,

versus

INTERNATIONAL TERMINALS CORPORATION, ETC., ET AL.,

Defendants.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING

(MARCH 11, 1994)

Before WISDOM, BARKSDALE and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Emilio M. Garza
United States Circuit Judge

REHG-4

Supreme Court, U.S.
FILED
JUL 6 1994
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(2)

No. 93-1960

In The

Supreme Court of the United States

October Term, 1994

INTERNATIONAL TERMINAL CORPORATION,

Petitioner,

v.

M/T LOIRE AND LOIRE TRANSPORT, INC.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For the Fifth Circuit

BRIEF OF RESPONDENT LOIRE TRANSPORT, INC. AS CLAIMANT OF THE M/T LOIRE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

Table of Authorities ii

Opinions Below 2

Statement of the Case 2

Summary of the Argument 3

Argument 4

Conclusion 9

TABLE OF AUTHORITIES

Page

CASES

Antevski v. Volkswagenwerk Aktiengesellschaft, 4 F.3d 537 (7th Cir. 1993) 5

Bd. of County Comm'rs v. United States, 308 U.S. 343 (1939) 5

Blau v. Lehman, 368 U.S. 403 (1962) 5, 8

Datascope Corp. v. SMEC, Inc., 879 F.2d 820 (Fed. Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990) 4, 5

Golden Gate Hotel Ass'n v. San Francisco, 18 F.3d 1482 (9th Cir. 1994) 5

Gorenstein Enterprises, Inc. v. Quality Care-USA, Inc., 874 F.2d 431 (7th Cir. 1989) 7, 8

In re M/V NICOLE TRAHAN, 10 F.3d 1190 (5th Cir. 1994) 4

Kim Crest, S.A. v. M/V SVERDLOVSK, 753 F. Supp. 643 (S.D. Tex. 1990) 6

Marathon Pipe Line Co. v. M/V SEA LEVEL II, 806 F.2d 585 (5th Cir. 1986) 4

Matter of Oil Spill by the AMOCO CADIZ off the Cost of France on March 16, 1978, 954 F.2d 1279 (7th Cir. 1992) 7, 8

Osterneck v. Ernst & Whinney, 489 U.S. 169 (1989) 5

Osterneck v. E.T. Barwick Ind., Inc., 825 F.2d 1521 (11th Cir. 1987), *aff'd sub nom., Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989) 5

TABLE OF AUTHORITIES – Continued

Page

Quesinberry v. Life Ins. Co. of North America, 987 F.2d 1017 (4th Cir. 1993) 4

Reeled Tubing, Inc. v. M/V CHAD G, 794 F.2d 1026 (5th Cir. 1986) 4

United States v. Central Gulf Lines, Inc., 974 F.2d 621 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 122 L.Ed.2d 669, 113 S.Ct. 1274 (1993) 4, 7

Western Pacific Fisheries, Inc. v. S.S. PRESIDENT GRANT, 730 F.2d 1280 (9th Cir. 1984) 5

STATUTES

28 U.S.C. § 1961 ..... 2, 4

RULES

Rule 10.1(a) of the Supreme Court Rules 8

No. 93-1960

In The

Supreme Court of the United States

October Term, 1994

INTERNATIONAL TERMINAL CORPORATION,

Petitioner,

v.

M/T LOIRE AND LOIRE TRANSPORT, INC.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For the Fifth Circuit

BRIEF OF RESPONDENT LOIRE TRANSPORT, INC. AS CLAIMANT OF THE M/T LOIRE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent Loire Transport, Inc. as Claimant of the M/T LOIRE ("Loire") prays that International Terminal Corporation's ("ITC") Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is attached as Appendix A to ITC's Brief.

STATEMENT OF THE CASE

The sole issue for review is the rate set for prejudgment interest by the District Court. ITC's Statement of the Case fails to mention that ITC stipulated in the Joint Pretrial Order that it is within the District Court's discretion to use the federal postjudgment interest rate under 28 U.S.C. § 1961 in setting the prejudgment rate. In pertinent part, the Joint Pretrial Order stated:

> 8. AGREED PROPOSITIONS OF LAW
>
> * * *
>
> 8. The trial court does not abuse its discretion in calculating prejudgment interest on a federal claim by looking to the federal standard established in 28 U.S.C. § 1961 instead of the rate established by a state statute. [citation omitted]
>
> * * *

ITC conceded this same point before the Court of Appeals below.

ITC recovered, as part of its award in the District Court, lost profits in the amount of $3,399,936.00. (See Appendix C to ITC's brief.) This sum is more than one-half of the total principal awarded. These lost profits represented revenues which the Court found that ITC would have earned over a fourteen month period beginning on 30 July 1987.

The District Court awarded prejudgment interest on ITC's total claim, including lost revenue, from 30 July 1987, until entry of judgment. The prejudgment rate was set at the postjudgment rate on the date the Court issued its opinion. The rate was 6.26%. The District Court did not find that ITC had actually borrowed funds at a higher rate of interest.

After the District Court entered its opinion, but before entry of its judgment (Appendix C to ITC's brief), ITC filed a Motion for Reconsideration urging, in part, reconsideration of the prejudgment rate. The District Court denied ITC's request. ITC then filed a Motion for New Trial after judgment was entered, again urging reconsideration of the prejudgment rate. This too was denied. At the Appellate level, ITC requested review of the rate. When the Court of Appeals affirmed the lower Court's judgment, ITC filed a Motion for Rehearing. This was denied.

ITC persists in alleging a claim of abuse of discretion by the District Court in setting the prejudgment interest rate despite its trial stipulation that it is not an abuse of discretion to use the postjudgment rate.

SUMMARY OF THE ARGUMENT

ITC's Petition for Writ of Certiorari should be denied as the District Court did not abuse its discretion in applying the postjudgment interest rate. Both ITC's admission in the Joint Pretrial Order that the District Court does not abuse its discretion in applying the postjudgment rate and its failure to show that there has been an abuse

establish that there is no reason for a review of the District Court's conclusion. Further, claims of a conflict between the Fifth and Seventh Circuit Courts of Appeals do not exist. Accordingly, ITC's alleged basis for review does not exist.

ARGUMENT

ITC in the Joint Pretrial Order conceded at the District Court level that it was within the discretion of that Court to use a federal postjudgment interest rate. This was also conceded by ITC in its brief to the Fifth Circuit. Nevertheless, ITC is unsatisfied by the District Court's use of its admitted discretion in awarding prejudgment interest at the 6.26%, the prevailing postjudgment interest rate on the date of entry of the Court's findings. 28 U.S.C. § 1961.

The award of prejudgment interest is within the sound discretion of the District Court. *Quesinberry v. Life Ins. Co. of North America*, 987 F.2d 1017, 1031 (4th Cir. 1993); *United States v. Central Gulf Lines, Inc.*, 974 F.2d 621, 630 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 122 L.Ed.2d 669 (1993); *Marathon Pipe Line Co. v. M/V SEA LEVEL II*, 806 F.2d 585, 593 (5th Cir. 1986); *Reeled Tubing, Inc. v. M/V CHAD G*, 794 F.2d 1026, 1029 (5th Cir. 1986).

Several Courts of Appeals have historically held that the District Court does not abuse its discretion by setting the rate based upon the postjudgment interest rate under 28 U.S.C. § 1961. *In re M/V NICOLE TRAHAN*, 10 F.3d 1190, 1196-97 (5th Cir. 1994); *Central Gulf Lines, Inc.*, 974 F.2d at 630; *Datascope Corp. v. SMEC, Inc.*, 879 F.2d 820, 828 (Fed. Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990);

Western Pacific Fisheries, Inc. v. S.S. PRESIDENT GRANT, 730 F.2d 1280, 1288-89 (9th Cir. 1984) (postjudgment rate is applicable to prejudgment rate unless there is substantial evidence that such rate is inequitable).

Therefore, the District Court's award is reviewed under an abuse of discretion standard. *Golden Gate Hotel Ass'n v. San Francisco*, 18 F.3d 1482, 1485 (9th Cir. 1994). An abuse only occurs when the record contains no basis upon which the District Court could rationally have made its decision or if the judicial action is arbitrary, fanciful, or clearly erroneous. *Datascope Corp.*, 879 F.2d at 828. The review is not based on what the reviewing court would have ruled if it was considering the case in the first instance, but is whether the decision of the lower court is reasonable. *Antevski v. Volkswagenwerk Aktiengesellschaft*, 4 F.3d 537, 540 (7th Cir. 1993).

The District Court's award, therefore, is reviewed according to the equities of the case. *Osterneck v. E.T. Barwick Ind., Inc.*, 825 F.2d 1521, 1536 (11th Cir. 1987), *aff'd sub nom., Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989). In *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 176 (1989), this Court recognized the discretion in setting the rate by concluding that the review returns to "fundamental considerations of fairness." " '[I]nterest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to consideration of fairness.' " *Blau v. Lehman*, 368 U.S. 403, 414 (1962) quoting from *Bd. of County Comm'rs v. United States*, 308 U.S. 343, 352 (1939).

Since it was conceded by ITC that it is within the sound discretion of the District Court to set the

prejudgment interest rate as it did, ITC must prove that it was a clear abuse of the District Court's discretion to set the prejudgment rate based upon a postjudgment rate at the time of the entry of its findings despite its stipulation that that is not an abuse.

In arguing that the award is "noncompensatory by any relevant measure", ITC overlooks the fact that the prejudgment awarded starts from 30 July 1987, before any of the claimed lost revenues had accrued. The District Court, in its judgment, awarded ITC $3,399,936.00 in lost profits for a fourteen month period beginning on 30 July 1987. ITC received interest on more than one-half of its award before it had accrued.[1]

Therefore, in assessing its 6.26% prejudgment interest from 30 July 1987, to ITC's lost profits, ITC has received a bonus for the loss of funds that it did not have on that date. Evidently the Court took this into consideration in assessing the equities by setting the prejudgment interest rate at the prevailing postjudgment rate on the date of entry of its findings by back dating that prejudgment award for lost profits to 30 July 1987. This necessarily increases the effective yield on the rate set by the Court.[2]

---

[1] In *Kim Crest, S.A. v. M/V SVERDLOVSK*, 753 F. Supp. 643, 650 (S.D. Tex. 1990), the District Court faced the same problem by awarding prejudgment interest on lost revenues in its discretion to only one-half of the lost revenue award.

[2] For instance, the difference between the interest earned on the total award from 30 July 1987, as compared to an award based on as the revenues were earned, results in ITC receiving a profit of approximately $110,000.

ITC also argues that there is a conflict between established Fifth Circuit law, *see e.g. United States v. Central Gulf Lines, Inc.*, 974 F.2d 621, 630 (5th Cir. 1992), and the Seventh Circuit decision *Matter of Oil Spill by the AMOCO CADIZ off the Coast of France on March 16, 1978*, 954 F.2d 1279 (7th Cir. 1992) ("*AMOCO CADIZ*"). There is no such conflict.

In *AMOCO CADIZ*, the court implicitly recognized that prejudgment is still within the District Court's discretion. *AMOCO CADIZ*, 754 F.2d at 1334-1335. The Seventh Circuit's ruling is merely based upon a finding that the District Court abused that discretion. *Id. AMOCO CADIZ* was a fact specific decision which involved protracted litigation (over 13 years) during which interest rates varied from 20% to 7.5%.[3] The average prime rate was 12% for the 13 years. The District Court used the postjudgment rate (7.5%) on the date of judgment. There is no evidence that while the case at bar was pending that interest rates fluctuated as wildly. In fact the average postjudgment rate was only 7.69%, while the average prime rate was only 9.25%. (ITC's brief at p. 5.) The equities supporting a rate at the postjudgment rate did not exist in a case which took 13 years to resolve at the trial level and during which interest rates fluctuated wildly.

---

[3] *AMOCO CADIZ* relied upon an earlier Seventh Circuit decision, *Gorenstein Enterprises, Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431 (7th Cir. 1989). *Gorenstein* involved similarly protracted litigation during which the prime interest rate fluctuated to as much as 20%. The District Court used a 9% rate. 874 F.2d at 436-437. Still the Seventh Circuit did not find an abuse of discretion. *Id.*

Similarly in *Gorenstein*, the Court recognized the District Court's discretion by stating that they "do not want to straitjacket the district judge. . . . " 874 F.2d at 437. The Court did, however, admonish the District Court not to set too low of an interest rate, but it did not find an abuse of discretion in that case.

Stripped to its essentials, *AMOCO CADIZ* is a fact determinative analysis of an abuse of discretion review of the District Court's actions.[4] That is in accord with the Fifth Circuit, and with this Court's view in *Blau*, for example, where prejudgment interest is awarded in response to fairness and not according to any rigid rule. 368 U.S. at 414. Since there is no intercircuit conflict, ITC's basis for review does not exist. Rule 10.1(a) of the Supreme Court Rules.

In the case at bar, however, the equities supporting the District Court do exist. The fact that ITC stipulated that the District Court could use the postjudgment rate is sufficient alone to support the award. In addition, the fact that the award of interest began to run on one-half of ITC's award even though that amount had not yet accrued on that date and the fact that the Court did not find ITC had actually borrowed funds at a higher interest rate support the Court's ruling.

ITC is requesting a further windfall by increasing that rate back to 30 July 1987. ITC does not, nor can it, state that the District Court applied a wrong legal standard in assessing the interest rate, nor is there anything

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[4] To interpret otherwise would put it in direct conflict with the decisions cited from this Court.

in the record to indicate that there has been a clear abuse of discretion by the District Court in setting the rate of interest as it has done so. The District Court's rate is imminently reasonable and fair under the facts.

CONCLUSION

For the reasons set forth above, Loire respectfully submits that the Petition for Writ of Certiorari should be denied as the setting of the prejudgment interest rate by the District Court is imminently reasonable and fair. Its affirmance by the Court of Appeals is correct.

Respectfully submitted,

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